No. 93-5418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORRIN SCOTT REED,

Petitioner,

v.

ROBERT FARLEY, Superintendent,
Indiana State Prison, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal courts have jurisdiction to grant *habeas corpus* relief based on alleged violations of the Interstate Agreement on Detainers ("IAD"), an agreement voluntarily entered into by some of the States, and from which States may withdraw at any time by repealing state statutes adopting the IAD.

2. Whether, assuming jurisdiction over such claims exists, alleged technical violations of the IAD which have been rejected by the state courts on direct review support collateral review on federal *habeas corpus* relief and, if so, under what circumstances.

3. Whether this Court should consider the merits of petitioner's IAD claim where it was not adjudicated by the court of appeals and where no issue regarding the merits of the claim was presented in the Petition for Writ of Certiorari.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Court Rules & Legislative Materials:

Miscellaneous:

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BRIEF OF RESPONDENTS

JURISDICTIONAL STATEMENT

Respondents accept the jurisdictional statement of petitioner with one significant exception. Petitioner's jurisdictional statement implicitly assumes that the district court had jurisdiction to entertain a petition for writ of *habeas corpus* based on alleged violations of the IAD. As shown in Part I of the Argument, *infra*, the IAD was voluntarily

entered into by several States, rather than imposed upon them by the federal constitution or by federal statutes. Therefore, it is not a "law[] . . . of the United States" within the meaning of statutes granting the federal courts jurisdiction to issue writs of *habeas corpus*.[1]

RELEVANT STATUTES

In addition to the provisions cited by the petitioner, this case involves Ind. Code § 35-33-10-4 (1993), the statute by which Indiana adopted the IAD. The text of Ind. Code § 35-33-10-4 (1993) is set out as Appendix A to this brief.[2]

As relevant here, Article 4 of the IAD provides that when a State lodges criminal charges against a prisoner in another State's custody, it may request transfer of the prisoner for purposes of criminal trial. Following designated procedures, the custodial State is then to send the prisoner to the receiving State. Article 4(c) provides:

> In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Article 6 of the IAD provides that the foregoing time period (and others in the IAD) are "tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." If, however, the prisoner "is not brought to trial within the period provided in . . . article 4," the court "shall enter an order dismissing the [charges] with prejudice." Article 5(c).

Also relevant is the last sentence of 28 U.S.C. § 2243, which provides: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

STATEMENT

Petitioner Orrin Scott Reed is a career criminal. Reed was convicted of Indiana charges of arson in 1954, grand larceny in 1960 and safe burglary in 1962. R. 15-16. He was later convicted of federal charges of bank robbery in 1967 and interstate transportation of stolen property and conspiracy in 1980. *Id.* While serving the most recent of his federal sentences at the federal penitentiary in Terre Haute, Indiana, he was charged in Fulton County, Indiana, with theft relating to a fraudulent insurance claim in which he reported a truck as stolen, when in fact it had been stripped and sold for parts at his salvage yard. R. 25.

1. Reed was transferred from federal custody under the IAD. To initiate this process, the prosecuting attorney sent a form entitled "Request for Temporary Custody" to the warden of the federal penitentiary, requesting that Reed be brought to Fulton County for trial. J.A. 4-6. According to the form, the prosecutor "propose[d] to bring this person to trial on this information within the time specified in Article 4(c) of the [IAD]." J.A. 5.

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[1] Respondents recognize that this position is inconsistent with a statement made in their Brief in Opposition to the Petition for Certiorari. *See* Brief in Opp. at 10. Nevertheless, because the point is jurisdictional, it cannot be waived, even by express stipulation. *Ahrens v. Clark*, 335 U.S. 188, 193 (1948) (declining to allow express waiver of limit on territorial jurisdiction to issue *habeas corpus*). Moreover, because of the importance of this jurisdictional point, respondents feel compelled to alert the Court to it.

[2] For the reasons stated in the Part I of the Argument *infra*, the federal version set forth in the appendix to Petitioner's Brief is *not* relevant to this case except to the extent that it shows that the United States is a party "State" under the Agreement and therefore honored Indiana's request for transfer.

Appended to the request was a certificate by the trial court that the prosecutor was an appropriate officer under the IAD, that the facts regarding the charge were correct, and transmitting the request "for action in accordance with its terms and the provisions of the Agreement on Detainers." J.A. 5-6. Nowhere does this certificate suggest that the trial court "certified compliance with the IAD," as petitioner repeatedly claims. *See* Pet. Br. at 7, 39-40.

Reed arrived in Fulton County to face the theft and habitual offender charges on April 27, 1983. R. 32, 36. Thus, the 120th calendar day after his arrival was August 25, 1983.

2. During the 120 days following his transfer, Reed filed no fewer than seven motions requesting dismissal of all charges. While some of these motions referred to the IAD, none mentioned Article 4(c), demanded trial within 120 days, or objected to either of the two trial dates which had been set for September, 1983. Reed's pretrial motions were pending before the Court in the aggregate for more than 90 days.

On May 4, 1983, just seven days after his arrival, Reed filed a "Petition for Writ of *Habeas Corpus*, and Dismissal of Charges," arguing that his transfer without a hearing was unlawful. J.A. 7-8. This motion was denied by the trial court on June 27, 1983, following a pretrial conference. J.A. 41.

Prior to the ruling on his May 4 motion, Reed filed three more motions, all entitled "Motion for Relief of Violations" and dated May 23, June 8 and June 20, 1983. R. 52-60; *see* J.A. 43-45. These motions repeated Reed's claim that he should have been afforded a pretransfer hearing under the IAD and cited case law. Reed also complained that his "illegal restraint" and restrictions at the county jail prevented him from meeting or telephoning witnesses. He requested that he be released to a federal halfway house so that he could prepare his defense. Following argument at the June 27, 1983, pretrial conference, at which Reed submitted yet another motion for dismissal,[3] these motions were taken under advisement. J.A. 35, 41.

On June 29, 1983, Reed filed another "Motion for Relief of Violations." J.A. 46-47. Specifically citing Articles 5(d) and 5(h) of the IAD, Reed claimed that "caring for" him under the IAD included haircuts and medical and dental care. On July 8, 1983, Reed filed yet another "Petition For Relief Of Violations Of State Local Confinement, Federal Law, And Motion To Dismiss All Charges." J.A. 48-50. Incorporating all of his prior motions, Reed reiterated his contentions that his confinement was unlawful and his ability to prepare a defense was impaired. The trial court denied the pending motions by a comprehensive order on July 15, 1983. J.A. 51-54.

On July 25, 1983, Reed filed another lengthy "Petition For Relief Of Violations" which repeated his previous such motions. J.A. 56, ¶¶ 1-2. Without reference to specific time limits or provisions of the IAD, Reed also requested trial "within the legal guidelines of the Agreement on Detainer Act . . . by which the State of Indiana is in violation, (see first motion filed before court) and is forcing petitioner to be tried beyond the limits of the Agreement on Detainer Act." J.A. 56, ¶ 4. Reed referred to his previous and pending requests for dismissal, "and requests no extension of time be granted beyond those guidelines." *Id.* Reed charged the court with a

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[3]This "motion" was a copy of a filing Reed had made in federal court in Terre Haute, demanding a pretransfer hearing. J.A. 28-31. When the trial court inquired why it was necessary to file a federal court pleading in the state court, Reed responded that it was "vitally important" that it be filed immediately because of his understanding that failure to do so would result in a waiver of his rights under the IAD. J.A. 27-29. The trial court treated this submission as an oral motion to dismiss, supplemented by the federal court filing. J.A. 41; *see also* J.A. 31-32. When asked if an immediate ruling was necessary, Reed answered, "No, I don't think there is any necessity for you to rule on that right at this time." J.A. 31.

three-month delay which he claimed had caused irreparable damage. J.A. 56-57. He again requested proper "care" in the jail under the IAD. J.A. 57-58.

On August 1, 1983, at a pretrial conference, Reed filed yet another petition seeking relief from "violations" of the IAD. J.A. 87. The motion renewed Reed's prior motions to dismiss and complained of lack of access to witnesses. The motion claimed the alleged "violations" would result in an unfair trial and referred vaguely to "the limited time left for trial within the laws." J.A. 88.[4] Following argument (in which Reed renewed his original contention that the lack of a pretransfer hearing at the federal penitentiary voided his transfer and required dismissal, but said nothing about the time for trial or the 120-day provision, J.A. 67-74), the trial court took the motions under advisement. The motions were denied by the trial court following another pretrial conference on September 13, 1983. R. 444-45.

Reed did not specifically mention the 120-day time limit of Article 4(c) of the IAD, or even cite that provision, in any of the foregoing motions or in argument concerning them. Nor did he object on the two separate occasions during that time period when the trial court established trial dates for after August 25. Instead, as noted above, the motions consisted largely of claims that he was entitled to a pretransfer hearing and complaints that he was unable to prepare a defense from jail, a disability that could be lifted if he were able to post bond after his federal sentence expired.

3. At the several hearings when trial dates were set or estimated for dates after August 25, Reed made no objection. Thus, at an initial hearing on May 9, 1983, where the court

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[4]In a motion requesting deposition subpoenas, Reed requested that deposition "appointments" be set and the subpoenas issued "as soon as possible due to approaching trial date and Detainer Act time limits." J.A. 91.

advised Reed of his trial rights, including his right under Indiana law to be tried within 140 days under Indiana procedural rules, J.A. 16, Reed asked for an estimate of when the trial would take place "without anyone's asking for continuances or extensions of time." The court replied, "August, perhaps September." J.A. 20. Although the 120th calendar day from Reed's arrival in Fulton County would occur on August 25, 1983, Reed said nothing to indicate that the proposed trial date was in any way unsatisfactory. To the contrary, Reed informed the court that he was scheduled to be discharged from federal custody in August. *Id.*

At the June 27, 1983, pretrial conference, the court raised the issue of a trial date. The State estimated that its case would take three or four days; Reed said he might call 15 witnesses which could take three days. J.A. 33-35. The court stated:

> I'm going to tentatively select September 13 as trial date and I anticipate six days at least for trial. I may very well hold two weeks. I recognize that we've been dealing with an August release date for you, Mr. Scott [*sic*]. The calendar is in such a condition that I do not have that kind of time available until the second week of September and then I've two weeks together that I can devote as much as is required for this.

J.A. 36. Reed remarked that he should be released two weeks before the September 13 trial date, unless he lost "good time" credit on his federal sentence, in which event he would still be eligible for parole on September 14. J.A. 39. Although September 13 would be the 139th day after his arrival in Fulton County, again Reed made no objection of any kind to the trial date, but suggested that his release to a halfway house would solve his problems. R. 369-70. The discussion, in context, seems to indicate Reed's preference for trial after he had become eligible for bond.

The next pretrial conference was held on August 1, 1983. Reed orally moved that bond be set, pointing out his imminent release from federal custody. J.A. 76-79. The court set bond in the amount of $25,000.00 conditioned on Reed's discharge from any other sentence of incarceration. J.A. 79-80. Finally, due to a "substantial conflict," the court reset the trial to begin six days later than originally set, on September 19, 1983. R. 81. Again, Reed did not object.

4. Even though Reed had repeatedly suggested that he would be better able to prepare for trial if released on bond, he moved to dismiss the charges on the 124th day after his arrival, immediately after he became eligible for bond because his federal sentence had expired. J.A. 94. The trial court, finding that Reed had waived his claim by failing to make the court aware of the time limit and failing to object to trial settings beyond the 120th day, denied the motion. J.A. 113-14.

On the morning of the date set for trial, Reed filed a motion for continuance on the ground that obstacles to his preparation for trial required a delay "in order to have a fair and meaningful trial." J.A. 128. The motion was rendered moot by the publication, two days before trial, of a local newspaper article that mentioned Reed's prior criminal record, prompting the court to offer Reed the alternative of a continuance to avoid any possible prejudice. J.A. 131-39. Given the choices of starting the trial, waiting one or two weeks, or waiting one or two months, Reed picked the third. J.A. 134, 141-42, 144. He explained that this would give him additional time to interview witnesses and that a civil suit he had filed against the trial judge in federal court might be completed by then. J.A. 141-42.

Reed was released on bond on September 28, 1983. J.A. 148. Trial began on October 18, 1983. J.A. 148. Reed was convicted and, in a separate proceeding, was found to be a habitual offender. J.A. 150. This latter finding added a

period of 30 years to his sentence. J.A. 2; *see* Ind. Code § 35-50-2-8.[5]

5. On direct appeal Reed asserted that the charges should have been dismissed for violation of the IAD's 120-day time limit.[6] The Indiana Supreme Court affirmed the conviction, holding *inter alia* that Reed had waived the IAD 120-day claim by failing to object to the setting of trial dates beyond that time limit and by filing motions indicating that he intended to proceed to the trial as scheduled. *Reed v. State*, 491 N.E.2d 182, 185 (Ind. 1986). The issue was raised again in a state post-conviction petition and on appeal from the denial of that petition, but the Indiana Supreme Court's holding was found to be *res judicata*. J.A. 169-73, 182.

6. Reed then sought a writ of *habeas corpus* from the United States District Court for the Northern District of Indiana. The district court denied the petition on the merits. The court reviewed the details of the state court motions and hearings and concluded that "a significant amount of the delay of trial is attributable to the many motions filed either by the petitioner or filed on the petitioner's behalf." J.A. 195. The court also held, pursuant to circuit precedent, that the IAD's tolling provision applies to "all those periods of delay occasioned by. . . motions filed on behalf of the defendant."

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[5]The petitioner is not so likely to die in prison as he asserts. Pet. Br. at 8. Under Indiana's day-for-day sentence credit system, *see* Ind. Code § 35-50-6-3, Reed is currently scheduled to be released on parole in June 2000, before his 69th birthday.

[6]Reed did *not* argue that his Sixth Amendment right to a speedy trial was violated, nor did he argue that he suffered any specific prejudice as a result of the delay. *O. Scott Reed v. State of Indiana*, Ind. Sup. Ct. No. 484 S 143, Appellant's Brief 1-2, 13-17 (filed in district court as a separate exhibit and marked by the court of appeals as Volume 9 of 20). Similarly, at no point in state post-conviction proceedings did Reed make a Sixth Amendment speedy trial claim. On *habeas* the district court also noted that Reed made no constitutional claim that he was denied a speedy trial. J.A. 197-98.

J.A. 196 (citing and quoting from three Seventh Circuit cases).

7. The court of appeals for the Seventh Circuit affirmed on the ground that federal *habeas* relief should not be granted based on an alleged violation of the IAD where, as here, the petitioner had a full and a fair opportunity to present the claim in the state courts. *Reed v. Clark*, 984 F.2d 209 (7th Cir. 1993) (J.A. 199-211). In analyzing the issue, the court of appeals noted that the outcome of the case was not changed by the alleged failure to try Reed within 120 days: "Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983." 984 F.2d at 212 (J.A. 208). Rehearing *en banc* was denied, J.A. 212, and this Court granted certiorari. 114 S. Ct. 437 (1993).

SUMMARY OF THE ARGUMENT

Because the IAD is a voluntary agreement entered into by several States, rather than a federally imposed obligation, federal *habeas corpus* relief is unavailable for several reasons.

I. There is no federal *habeas corpus* jurisdiction over petitioner's claim because the IAD simply is not a "law[] . . . of the United States" within the meaning of the statutes granting *habeas* jurisdiction to the district courts, 28 U.S.C. §§ 2241, 2254. As this Court has held in cases from a variety of contexts, the term "laws of the United States" means national laws imposing federal obligations. The IAD, as a voluntary agreement among the States, does not fall within this definition. Moreover, statutory terms such as those in the grant of *habeas* jurisdiction derive their meaning from the purpose of the statutes in which they are used. The purpose of the statutes granting federal *habeas* jurisdiction over state prisoners was, as this Court has noted, to provide an alternative means of enforcing federal constitutional and statutory rights created in the wake of the Civil War. Again, the IAD does not represent a federally imposed obligation of

any sort, and therefore does not fall within the jurisdictional grant. Indeed, in the respects that are important for federal *habeas corpus*, such agreements are more like state law than federal law, and it would therefore be inconsistent with established principles of federalism to premise *habeas corpus* relief on such agreements.

While the Court has held that interstate compacts present questions of federal law for this Court, those cases are not dispositive of the jurisdictional issue under the *habeas* statutes. The reasons this Court retains power to resolve disputes over the meaning of such compacts in accordance with principles of "federal common law" are rooted in the pragmatic fact that neither state courts nor state law can provide definitive answers to such questions. These reasons are wholly unrelated to the purposes of the federal *habeas* statutes, and do not therefore dispose of the question.

II. Even if petitioner's claim fell within the technical terms of the jurisdictional statutes, this Court should for prudential reasons hold collateral relief unavailable for IAD claims in accordance with the principles of *Stone v. Powell*, 428 U.S. 465 (1976). Both the essentially nonfederal nature of its provisions and the fact that it applies to such a small class of defendants belie any claim that the IAD is a federal guarantee that is essential to a fair trial. Thus, the IAD stands in marked contrast to the right to counsel, the right to be convicted only on constitutionally sufficient evidence, the right to proceedings untainted by racial discrimination, and freedom from police coercion — guarantees that this Court has held are not subject to *Stone's* analysis. Neither fundamental fairness, nor any other federal policy, would be materially enhanced by permitting collateral review of state court determinations under the IAD.

On the other hand, important values of finality and federalism would be materially impaired by permitting such review. The tensions that exist any time a federal court

reviews a state criminal conviction are exacerbated by the fact that the federal *habeas* court would be enforcing what is, for *habeas* purposes, essentially a state law. Moreover, the flexible and fact-specific nature of the IAD's governing rules would serve to make such federal review especially intrusive and at the same time most frequently fruitless.

Finally, in contrast to other claims this Court has held not subject to *Stone*, IAD claims cannot readily be recast as constitutional ones, despite petitioner's suggestion to the contrary, because there is such a yawning gulf between the standards this Court has established for constitutional speedy trial claims and the technical rules of the IAD. Thus, a rule precluding federal collateral relief would create real benefits in terms of conservation of scarce federal judicial resources.

III. Even if claims such as petitioner's could be reviewed on federal *habeas corpus* at all, they would remain subject to the "fundamental defect" and "complete miscarriage of justice" standard this Court has consistently applied to collateral review of nonconstitutional claims. The standard, at a minimum, requires a case-specific showing of prejudice, something petitioner is unable to provide.

IV. Finally, even if the Court holds that IAD claims are cognizable on federal *habeas corpus* review, it should decline petitioner's invitation to address the merits of his IAD claims, because those issues were not addressed by the court below and are not fairly encompassed in this Court's grant of certiorari.

ARGUMENT

I. THE IAD IS NOT A "LAW OF THE UNITED STATES" WITHIN THE MEANING OF THE *HABEAS CORPUS* STATUTES AND THEREFORE THE FEDERAL COURTS ARE WITHOUT JURISDICTION TO GRANT *HABEAS CORPUS* RELIEF BASED ON ALLEGED VIOLATIONS OF THE IAD.

Since 1867, when Congress first extended the federal courts' *habeas corpus* power to cover state prisoners, it has consistently provided that the writ may issue only where the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241; 2254. That limit is jurisdictional. As this Court held in *Carfer v. Caldwell*, 200 U.S. 293, 296 (1906), "The jurisdiction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations." *See also Matters v. Ryan*, 249 U.S. 375, 377 (1919). Here, of course, there is no claim that petitioner's custody violates either the Constitution or any treaty of the United States. Thus, the question is whether the IAD, an agreement voluntarily entered into by some States, is a "law of the United States" within the meaning of the provision. The answer is no.

As shown below, this Court has held in a variety of contexts that the term "laws of the United States" denotes national legislation enacted by Congress that imposes federal obligations. Plainly, an interstate agreement like the IAD, that the States have voluntarily entered and that does not even apply to all States, is not such a law. At the outset, as a textual matter, this construction is particularly natural in a provision such as § 2254 that requires an actual "violation of" one of the three forms of formally promulgated federal law,

i.e., the "Constitution or laws or treaties of the United States." Indeed, it would be difficult to read the term "laws of the United States" as encompassing any provision whose interpretation presents a federal question, as petitioner seems to suggest, without rendering much of the jurisdictional statute surplusage. That construction is by the purposes of the *habeas* statutes.

In the context of the *habeas* statutes, this Court has specifically held that a territorial Act, something that would normally be considered a matter of federal law, was not a "law of the United States." *Matter of Moran*, 203 U.S. 96, 104 (1906). Similarly, in *People v. Rupert Hermanos, Inc.*, 309 U.S. 543 (1940), this Court held that territorial legislation, even though enacted by Congress, was not a "law of the United States" for purposes of a statutory provision vesting the federal district courts with exclusive jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States." 309 U.S. at 549-50. And this Court held repeatedly that legislation enacted by Congress for the District of Columbia did not amount to a "law of the United States" within the meaning of statutory provisions governing this Court's appellate jurisdiction. *E.g., American Security & Trust Co. v. District of Columbia*, 224 U.S. 491 (1912); *see also Washington, Alexandria, & Mt. Vernon Railway Co.*, 236 U.S. 190, 192 (1915) (treating as "not open to controversy" the proposition that the term embraces "only laws of the United States of general operation" and therefore does not include legislation local to the District; collecting cases); *accord Key v. Doyle*, 434 U.S. 59 (1977) (legislation passed by Congress for the District was not a "statute of the United States" for purposes of similar provision).

A proper analysis of the issue requires the recognition that "[w]hether a law passed by Congress is a 'law of the United States' depends on the meaning given to that phrase by its context." *Hermanos*, 309 U.S. at 549. Thus, in *American Security & Trust*, this Court unanimously noted

that although there was "no doubt that [congressional legislation for the District of Columbia] was, in one sense, a law of the United States . . ., it needs no authority to show that the same phrase may have different meanings in different connections." 224 U.S. at 494. *Accord, e.g., SEC v. National Securities, Inc.*, 393 U.S. 453, 466 (1969) (statutory terms must be interpreted in light of statutory purpose "[w]hatever these or similar terms may mean" in other contexts).

When the purpose of federal *habeas corpus* jurisdiction is brought into focus, it is clear that an interstate agreement voluntarily entered into by some States is not a "law of the United States" within the meaning of the *habeas* statutes. In *Fay v. Noia*, 372 U.S. 391 (1963), this Court extensively canvassed the history and purpose of the 1867 Act extending the federal courts' *habeas* power to cover state prisoners. Key to the Court's analysis was the recognition that the statute must be "viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy." 372 U.S. at 415. The Court noted that "Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments" and concluded that "the measure that became the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees." 372 U.S. at 415-16. Whatever else may be disputed about the history and purpose of federal *habeas corpus* jurisdiction, it cannot be gainsaid that the statute was designed to enforce *federally imposed obligations*, whether contained in the federal constitution or in federal statutes passed to implement constitutional provisions. The *habeas corpus* statutes were *not* designed as a mechanism to enforce obligations that the

States assumed in the exercise of their own lawmaking powers.[7]

The IAD simply does not represent such a federally imposed obligation. While petitioner's brief is replete with statements reflecting the assumption that Congress imposed the IAD upon the States when it adopted the IAD Act, that assumption is both historically and legally wrong. The initiative for the IAD came from the state governments themselves. *See United States v. Mauro*, 436 U.S. 340, 349-51 (1978). The States began adopting and enforcing the IAD long before Congress entered it on behalf of the United States and the District of Columbia as parties. *See* Appendix B; H. R. Rep. No. 91-1018, 91st Cong., 2d Sess. (1970), at 3 (noting that, as of the time Congress was considering the IAD, 25 states had adopted it); S. Rep. No. 91-1356, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Adm. News at 4864, 4866 (same). The legislative history

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[7]*Fay*'s historical analysis has been strongly criticized from the outset for its alleged failure to give effect to Congress' understanding that the writ of *habeas corpus* was limited in scope to jurisdictional issues. *See Fay*, 372 U.S. 853-61 (Harlan, J., dissenting); Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 450 (1966); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 30 (1965); *cf.* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (pre-*Fay* analysis reaching essentially the same conclusion). While the core doctrine of *Fay* — that a federal *habeas* court has jurisdiction to review federal constitutional claims that have been considered and rejected by the state courts — has essentially been regarded by this Court as settled, the controversy over whether *Fay*'s reading of history and legislative intent was correct has never entirely subsided and echoes throughout the Court's *habeas corpus* jurisprudence. *See, e.g., Wright v. West*, 112 S. Ct. 2482 (1992) (multiple opinions); *Schneckloth v. Bustamonte*, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring). The Court need not revisit that controversy in this case, however, because even at its broadest, *Fay* stands for no more than the proposition that *habeas corpus* is available to enforce federally imposed obligations.

also demonstrates that Congress was merely entering into the IAD on behalf of the United States and the District of Columbia, not imposing new federal obligations upon the States. *See* 116 Cong. Rec. 14,000 (May 4, 1970) (remarks of Rep. Poff); 116 Cong. Rec. 38,840 (November 25, 1970) (remarks of Senator Hruska); *accord* H. R. Rep. No. 91-1018, *supra*, at 3; S. Rep. No. 91-1356, *supra*, 1970 U.S. Code Cong. & Adm. News at 4866.

Moreover, a State's participation in the IAD is wholly optional and voluntary. *See* Article 8 (IAD does not become effective as to a State until the State has enacted it into law, and a State can withdraw from IAD by repealing the statute that does so). Indeed, as petitioner acknowledges, two States have chosen not to join the IAD at all, Pet. Br. at 24 n.12, and some jurisdictions, in enacting it into law, have adopted individual variations. *See State v. Seadin*, 593 P.2d 451, 453 (Mont. 1979) (noting that Montana time limit under Article 3 of the IAD required trial "at the next term of court" rather than within 180 days of a prisoner's request, as in most States).[8]

Thus, the IAD is more like state law than federal law in the respects that are relevant to the exercise of federal *habeas corpus* jurisdiction. Unlike the fundamental constitutional guarantees at issue in *Fay*, and unlike federal statutes imposed on the States by the Reconstruction Congress or subsequent Congresses, the IAD requires for its effectiveness the legislative consent of the State in question, a consent that can be revoked at any time. To predicate federal *habeas corpus*

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[8]Indeed, in 1988, Congress enacted an amendment to its own adoption of the IAD, indicating that, where the United States is a receiving "state," its failure to honor the time limits of the IAD will not necessarily result in a dismissal of the charges with prejudice. 18 U.S.C. app. § 9 (quoted in Appendix to Petitioner's Brief at 11a-12a). The same section of the federal Act also effectively exempts the federal government from the so-called "anti-shuttling" provisions of the IAD.

relief on such an exercise of the States' lawmaking power would do violence to principles of federalism this Court has recognized. *Cf. Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

Nor are this Court's cases asserting its power to construe interstate compacts to the contrary. Just as it has done with territorial legislation, this Court has also held that interstate compacts may constitute federal law for some purposes but not others. Thus, Justice Brandeis, writing for the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), held that an interstate compact was not a "treaty or statute of the United States" within the meaning of former section 237(a) of the Judicial Code (28 U.S.C. § 344 (1935 ed.)), which set forth the Court's appeal jurisdiction, but nonetheless held that a claim under such a compact fell within the Court's certiorari jurisdiction under former section 237(b). 304 U.S. at 109-10. Two years later, the Court further explained that "construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege, or immunity' which when 'specially set up or claimed' in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code." *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419, 427-28 (1940) (citing *Hinderlider*, among other cases, as support).[9]

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[9]In light of *Delaware River's* reliance upon *Hinderlider*, there can be no suggestion that *Delaware River* is somehow inconsistent with *Hinderlider*. *Accord Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 279 n.5 (1959) (also continuing to treat *Hinderlider* as good law); *cf. Cuyler v. Adams*, 449 U.S. 433, 439 n.7 (1981).

The construction of interstate agreements presents a question of federal law for ultimate resolution by this Court because of the compelling need for a neutral forum and source of law to govern agreements between coequal States. *See State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951):

> "Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese*, and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. A decision in the present instance by the state court would not determine the controversy here."

341 U.S. at 29 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 176-77 (1930); internal citation omitted). These reasons, are, of course, the same reasons that "federal common law" provides the rule of decision in controversies between States under this Court's original jurisdiction. *State ex rel. Dyer v. Sims*, 341 U.S. at 26-27 ("This Court decides such controversies according to 'principles it must have the power to declare.'") (quoting *Missouri v. Illinois*, 200 U.S. 496, 519 (1906)).

More importantly, the rationale of these cases has nothing to do with the reasons for which Congress extended the federal *habeas* power to cover state prisoners. As the Court noted in *Fay*, the *habeas* power is a method for effective federal enforcement of fundamental federal rights at the *case-specific* level that is necessary for those rights to be extended to all within their protection. The need to resolve disputes between States over the meaning of interstate agreements is of a different character, and is precisely the sort

of task for which *this* Court's original and certiorari jurisdiction were designed. While it could be argued that the Court adopted an overly expansive reading of its own jurisdictional statutes in the Compact Clause cases, no one could dispute the pragmatic concerns underlying such an expansive reading. However, those pragmatic concerns provide no justification for applying those cases uncritically to the *habeas* statutes, which were designed for wholly different purposes.

Although there is language in both *Cuyler v. Adams*, 449 U.S. 433 (1981), and *Carchman v. Nash*, 473 U.S. 716 (1985), tending to suggest a contrary result, neither case squarely addressed the question of whether the IAD is one of the "laws of the United States" within the meaning of the *habeas* statutes. *Cuyler* involved a claimed violation of the Due Process and Equal Protection Clauses in the context of a suit brought under 42 U.S.C. § 1983, 449 U.S. at 436-37, and thus the jurisdiction of the federal courts over the claim was never in question. The IAD was simply construed to avoid the constitutional questions. *Id.* at 437. *Carchman*, while brought under 28 U.S.C. § 2254, was resolved by virtue of this Court's holding that the IAD did not apply to probation revocation proceedings, and, other than the reiteration of the holding in *Cuyler*, contained no discussion of the federal nature of the IAD. *See* 473 U.S. at 719. While this determination of the "merits" of the IAD claim might be argued to be an "implicit" holding that the *habeas* court had jurisdiction, this Court has steadfastly refused to treat cases in which a latent jurisdictional question was not discussed as dispositive of the issue. *E.g., Pennhurst*, 465 U.S. at 119 ("'[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.'") (quoting *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

This Court, of course, retains jurisdiction to resolve disputes over the meaning of the IAD on certiorari or, if the dispute is between party states, in an original action, just as it does with other interstate agreements. Such review is more than adequate to provide any needed "uniformity," something that exercises of federal *habeas* jurisdiction by lower courts is incapable of providing in any event. *See Lockhart v. Fretwell*, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) (state courts are not bound by interpretations of federal law by lower federal courts).

However, none of this Court's decisions can be fairly read to hold that a State's alleged failure to satisfy the terms of an agreement voluntarily entered into, and in which its participation can be terminated at any time, constitutes a violation of the "laws of the United States" so as to provide the jurisdictional prerequisite for federal *habeas corpus* relief. For the reasons stated above, this Court should decline to do so now.

II. UNDER *STONE v. POWELL*, FEDERAL HABEAS RELIEF SHOULD NOT BE AVAILABLE FOR PETITIONER'S IAD CLAIM.

Even if petitioner's claim comes within the technical reach of federal *habeas corpus* jurisdiction, it is nevertheless not an appropriate ground on which to grant collateral relief. *Stone v. Powell*, 428 U.S. 465 (1976), established the framework for considering limitations on the availability of collateral relief on *habeas* and held that such relief is unavailable for alleged violations of the Fourth Amendment's exclusionary rule where there are adequate processes for review of such claims in the state courts. A similar conclusion is even more strongly warranted for petitioner's IAD claim.

A federal *habeas corpus* action is an exception to the normal rule requiring federal courts to recognize the finality of, and give full faith and credit to, state court judgments. *See* 28 U.S.C. § 1738. This exception is not only limited to a

narrow class of federal claims but also is wholly discretionary: the federal *habeas* statute does not command relief, but merely *permits* relief as "law and justice require." 28 U.S.C. § 2243; *see also* 28 U.S.C. § 2241 ("Writs of habeas corpus *may* be granted . . . .") (emphasis added); *Withrow v. Williams*, 113 S. Ct. 1745, 1750 (1993); *Stone*, 428 U.S. at 478 n.11. That discretion, of course, must be exercised based on sound equitable principles, consistent with the historically developed role of federal *habeas corpus* as a tool for vindicating federal rights that are fundamental to a fair trial while respecting the interests of finality and federalism. *See Fay v. Noia*, 372 U.S. 391, 438 (1963) ("habeas corpus has traditionally been regarded as governed by equitable principles"); *see also Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1718-20 (1992); *id.* at 1722-24 (O'Connor, J., dissenting); *Coleman v. Thompson*, 111 S. Ct. 2546, 2562-65 (1991); *McCleskey v. Zant*, 499 U.S. 467, 490-92 (1991); *Butler v. McKellar*, 494 U.S. 407, 412-14 (1990); *Teague v. Lane*, 489 U.S. 288, 308-10 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977).

In *Stone v. Powell*, this Court exercised that discretion and concluded that an asserted violation of the Fourth Amendment's exclusionary rule should not give rise to federal *habeas* relief if the petitioner had a full and fair opportunity to litigate his claim in the state courts. On one side of the ledger, the Court explained, was the unusual nature of the right: violation of the exclusionary rule does not abrogate a constitutional right related to the soundness of the criminal trial. Rather, the rule is intended to deter future violations of the Fourth Amendment, and that purpose would only be marginally advanced by *habeas* review. *Stone*, 428 U.S. at 486; *Withrow*, 113 S. Ct. at 1750. On the other side of the ledger was the comparatively high cost of collateral review of such claims: reliable evidence is excluded; and systemic interests in judicial efficiency, finality, and federalism are impaired. *Stone*, 428 U.S. at 490-93; *Withrow*, 113 S. Ct. at

1750. Thus, the Court concluded this balance required a rule denying collateral review by a federal *habeas* court. *Stone*, 428 U.S. at 494.

The Court has continued to apply this framework in various cases since *Stone*, most recently in *Withrow*. In each case where the Court found *habeas* relief to be available, the Court stressed that the right at stake was one that was considered necessary to a constitutionally fair and reliable trial. Thus, in *Withrow*, the Court explained that the Fifth Amendment "embodies 'principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle.'" *Id.* at 1753 (quoting *Bram v. United States*, 168 U.S. 532, 544 (1897)). The Court also emphasized that the Fifth Amendment right protected by *Miranda v. Arizona*, 384 U.S. 436 (1966), does not "serve some value necessarily divorced from the correct ascertainment of guilt." *Id.* at 1753.

This same reasoning formed the basis of the Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). There, the Court found that the "right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Id.* at 374 (citations omitted).

Likewise, in *Rose v. Mitchell*, 443 U.S. 545 (1979), the Court stressed that an alleged violation of the Fourteenth Amendment's right against racial discrimination in the selection of members of a grand jury "brings the integrity of the judicial system into direct question," *id.* at 563, and "strikes at the fundamental values of our judicial system and

our society as a whole," *id.* at 556.[10] And, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court found that the "question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." *Id.* at 323.

As each of these cases establish, what is critical is whether the costs of second-guessing final state-court adjudications by federal district courts are justified by a need to protect federal rights that are fundamental to a fair trial.

Judged by these standards, petitioner's IAD claim falls far short. Indeed, it is an even more starkly inappropriate basis for *habeas* relief than the Fourth Amendment claim at issue in *Stone*. Petitioner's claim does not rest on a constitutional right or a judicially developed doctrine designed to protect such a right, as did each of this Court's decisions distinguishing *Stone*. In fact, petitioner's claim does not even rest on a *statutory* command prescribing minimum federal fair-trial guarantees. Rather, the duty petitioner seeks to enforce was voluntarily assumed by Indiana in agreement with other States, not imposed by the federal sovereign. In addition, that agreement applies only to a tiny proportion of state criminal defendants — those transferred from the custody of a different jurisdiction — a circumstance having no relation to the fairness of the criminal trial. Thus the IAD, far from prescribing necessary elements for a fair trial, merely serves the prosecutorial and penal interests of the *States* who are parties to the agreement — interests that are unrelated to the fairness of the trial. This type of claim is a uniquely

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[10] Also important in *Rose* was the unique place that the Fourteenth Amendment's Equal Protection Clause — particularly its core ban on race discrimination — holds in the Court's *habeas* jurisprudence. As the Court noted, collateral review of race discrimination claims would not raise new federal-state tensions because federal courts had been granting such relief for nearly a century. *Id.* at 562.

inappropriate basis for the discretionary exercise of federal *habeas corpus* power.

A. Petitioner's IAD Claim Does Not Involve Federal Guarantees Fundamental To A Fair Trial.

Several features of the IAD confirm that, like the exclusionary rule at issue in *Stone* and unlike the constitutional rights at issue in the decisions distinguishing *Stone*, the 120-day time limit of the IAD cannot sensibly be understood as a fundamental federal right that has anything to do with reliability of the outcome or the integrity of the process. First, the IAD is categorically different from the measures considered in the Court's *Stone-Withrow* line of cases because it embodies obligations voluntarily assumed by States, not imposed on States by federal statute or constitutional provision.

Moreover, given the voluntary nature of the IAD, it cannot reasonably be viewed as representing any minimum federal standards for the fair trial of state criminal defendants. Violations of obligations voluntarily assumed by States, in the form of ordinary state legislation or state constitutional provisions, are not proper bases for federal *habeas* relief, no matter how unmistakable the violation. 28 U.S.C. § 2254; *Estelle v. McGuire*, 112 S. Ct. 475, 480 & n.2 (1991). In terms of the core purposes of federal *habeas corpus*, a violation of the IAD is no different: it does not represent a guarantee that federal lawmakers or constitution framers have deemed essential for a valid conviction, much less one so essential as to demand access to a federal forum outside the normal channels of direct appeal.

It is a peculiar kind of "federal" guarantee that States can freely avoid by refusal to join the agreement in the first place or voluntary withdrawal. Yet that is precisely the status of the IAD. *See supra* at 17. Indeed, it is a peculiar kind federal guarantee that is wholly inapplicable to defendants in

some States — at present, in Mississippi and Louisiana; at earlier times, in many other States. *See* Appendix B.

Not only can States decline to sign on, but even within a State, most defendants are not covered by the IAD. The 120-day time limit applies only to defendants transferred from the custody of another jurisdiction under Article 4. Wholly unaffected by Article 4(c) of the IAD are defendants not in custody at the time of trial, defendants in custody elsewhere in the same jurisdiction, and defendants transferred under Article 3. It cannot seriously be said that a trial beyond 120 days has been federally determined to be less fair and reliable when almost no state defendant can invoke such a 120-day rule. And what distinguishes transferees from all other state defendants — how they got in to the jurisdiction of the court — has nothing whatsoever to do with the fairness of their trials.

Similarly, the extraordinary flexibility of the 120-day rule, and the extraordinary harshness of the dismissal remedy, together make it an implausible source of rights fundamental to a fair trial. On the one hand, the trial court has the broadest possible discretion to authorize trials beyond the presumed 120 days: "for good cause shown in open court" the trial court may grant "any necessary and reasonable continuance." Article 4(c). The IAD also provides that the 120-day limit can be tolled while "the prisoner is unable to stand trial," Article 6(a), a provision that has been interpreted broadly to increase still further the discretion of the trial court. *See infra* at 41. On the other hand, the required remedy of dismissal *with prejudice* (Article 5(c)), forbidding a new trial regardless of the seriousness of the offense or the absence of prejudice to the defendant, is harsher than any remedy normally granted for violations of even the most fundamental constitutional rights.[11] In terms of the nature of

[11] In 1988, Congress specifically relaxed this remedial constraint for federal prosecutions, permitting dismissal *without* prejudice if the

the right and the authorized sanctions for its violation, the IAD provision invoked by petitioner is thus wholly out of line with the types of guarantees routinely considered in federal *habeas corpus*.

These features of the IAD not only show that it does not create a federal right that is fundamental to a fair trial, they simultaneously show that the 120-day rule serves to protect the interests of the *sending* State — a fact that is hardly surprising given that the IAD is an agreement among the several States. The IAD was developed in large part to provide an efficient and reliable means for transferring prisoners between jurisdictions. *See* Council of State Governments, Suggested State Legislation Program for 1957 ("Legislative Program") at 74-79. A central component of that purpose was the "assurance that any prisoner released to stand trial in another jurisdiction will be returned to the institution from which he was released. . . . Unless there is such assurance, many jurisdictions will understandably hesitate to cooperate." *Id.* at 75. *See also United States v. Mauro*, 436 U.S. 340, 350 (1978). This assurance finds expression, among other places, in Article 4(c)'s 120-day requirement. *See also* Article 5(e).

Article 4(c) also promotes the "expeditious and orderly disposition" of detainers, Article 1, a purpose the drafters viewed primarily as benefiting the participating States, not defendants. According to the drafters, when detainers remain outstanding "[t]he prison administrator is thwarted in his effort toward rehabilitation. . . . [The prisoner] often becomes embittered with continued institutionalization and the objective of the correctional system is defeated." Legislation Program, *supra* at 74. In addition, the drafters believed that

circumstances warrant. 18 U.S.C. app. § 9(1). To the extent that Congress has spoken about the nature of the IAD right, therefore, it has signalled its view of the relative *unimportance* of the right.

outstanding detainers adversely affect the State's interest in proper sentencing: "A rather long sentence may be indicated, but the judge hesitates to give such a sentence if the offender is going to serve subsequent sentences, or if he stands to lose the privilege of parole because of a detainer." *Id.*[12] Indeed, nothing in the language of the IAD or the literature of its drafters indicates that Article 4(c)'s purpose was to benefit defendants, much less establish a federal speedy trial right. Concomitantly, the 120-day rule is entirely unrelated to the integrity of the outcome or process of a criminal trial.[13]

Petitioner is simply wrong when he suggests that the fact that Congress adopted the IAD in response to this Court's decisions in *Smith v. Hooey*, 393 U.S. 374 (1969), and *Dickey v. Florida*, 398 U.S. 30 (1970), shows that Article 4(c) was intended to protect prisoners' constitutional speedy trial rights. Pet. Br. at 17. The IAD was drafted by the Council of State Governments and adopted in several States well over a decade before *Hooey* and *Dickey* were ever decided. *See* Appendix B. It is thus hardly remarkable that the literature of the drafters makes no reference to the constitutional speedy trial right. *See* Legislation Program, *supra*. Moreover, the congressional legislative history, to the extent that it is even relevant (it merely reflects Congress's decision to participate in the IAD, and sheds no light on the States' reasons for

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[12]Such rehabilitative opportunities in the sending State, once lost, cannot be regained, particularly as a result of collateral review when the prisoner is serving his new sentence in the receiving State. Thus, like the exclusionary rule in *Stone*, the primary purpose of the 120-day and its accompanying dismissal penalty is to deter future violations. As in *Stone*, the availability of collateral review to enforce the IAD serves that goal marginally, if at all.

[13]While Article 3 of the IAD may have been intended to benefit prisoners by allowing them the opportunity to request disposition of outstanding detainers, *see Carchman v. Nash*, 473 U.S. 716, 720-21 (1985), petitioner's claim is not based on Article 3. Thus Article 3's purpose is of no relevance here.

creating it or Indiana's reasons for adopting it), suggests that Congress' concern was to provide a procedure whereby federal prisoners could be transferred to state custody to *avoid* having convictions vacated or reversed, such as occurred in *Hooey* and *Dickey*. *See* S. Rep. No. 91-1356, *supra*, 1970 U.S. Code Cong. & Adm. News at 4864.

In any event, even if petitioner were correct that the IAD was adopted in part as a result of "speedy trial" concerns, those concerns related to the problem of prisoners who could not be tried by States because they were in federal custody (in *Hooey* and *Dickey*, the trials were delayed for seven and eight years, respectively, because the defendants were in custody). That problem, and provisions of the IAD that solved it, are not at issue here. It was the IAD's *mechanism of transfer*, as a practical matter, that solved *that* speedy trial problem. The Committee Report's discussion of the need to solve the problem in no way suggests that the 120-day rule was intended as some sort of prophylactic protection of Sixth Amendment rights.

Of equal importance, there is not only an enormous difference between a seven-year delay and a 121-day delay, but also between a Sixth Amendment violation and a technical violation of the 120-day rule. As explained below, trial after 120 days does not by itself create even a colorable Sixth Amendment claim under the standards of *Barker v. Wingo*, 407 U.S. 514 (1972), and its progeny. In short, petitioner has cited nothing to suggest that Congress linked the *120-day provision of Article 4(c)* with Sixth Amendment rights — something that would be quite surprising given the nature of the IAD provisions.

In this regard, contrary to petitioner's contention, Article 4(c) does "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow*, 113 S. Ct. at 1753. *See* Pet. Br. at 20-21. As explained above, Article 4(c) was designed to benefit the States by providing an efficient

method of transferring prisoners and assuring their return. While petitioner is correct that the *Sixth Amendment* speedy trial right enhances the truth-seeking process, it does not follow that a technical violation of the IAD's 120-day requirement would have any effect of constitutional significance. It cannot seriously be argued that a trial held 121 days following transfer would be any less sound than one held on day 120. Under petitioner's view, however, the prisoner who is tried on day 121 must be released from incarceration on that charge -- an outcome that would do no more than "serve mechanistic rules quite unrelated to justice in a particular case." *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

B. The Institutional Costs of Federal Collateral Review of IAD Claims Are Considerable.

That the IAD is not a minimum federal guarantee that is fundamental to a fair trial is reason enough to deny petitioner's claim for *habeas* relief. That conclusion is only confirmed by considering the other side of the ledger. The costs of entertaining IAD claims are considerable.

Plainly, federal *habeas* review of an IAD claim arising out of a state court conviction would intrude on the interests of finality and federalism that are central to our federal system of criminal justice. These costs were sufficient to deny collateral review in *Stone*, 428 U.S. at 489-92, and as discussed above, the reasons arguing in favor of collateral review of IAD claims are even less compelling than the reasons that could be urged in support of such review for Fourth Amendment claims.

In addition, in light of the flexibility of the 120-day time limit, *habeas* review by a federal court would involve second-guessing of highly discretionary judgments by state-court judges. The federal court would have to examine whether the state-court judge had "good cause" to grant a continuance, whether the continuance was "reasonable" and whether the

defendant was "unable to stand trial." Article 4(c), Article 6(a), Ind. Code § 35-33-10-4. The deferential standard that a federal court would properly use to review these claims, *cf.* 28 U.S.C. § 2254(d), makes it unlikely that any errors would actually be found. Meanwhile, the federal courts will have engaged in a highly intrusive inquiry into what amounts to case management.

Moreover, denying review of IAD claims would benefit the federal courts in the exercise of their *habeas* jurisdiction. IAD claims necessarily involve fact-specific judgment calls due to the IAD's tolling and continuance provisions. And in contrast to the situation in *Withrow*, where the Court found as the "most important[]" reason for permitting collateral review the fact that "virtually all" *Miranda* claims could simply be recast as involuntariness claims under the Fifth and Fourteenth Amendments, 113 S. Ct. at 1754, IAD claims based on technical violations of the 120-day time limit cannot in any significant number of cases provide even a colorable foundation for Sixth Amendment speedy trial claims. In order to raise even a colorable claim under the Sixth Amendment, there must be a delay of years, not days. *See, e.g., Doggett v. United States*, 112 S. Ct. 2686 (1992) (eight-year delay); *Moore v. Arizona*, 414 U.S. 25 (1973) (three-year delay); *Barker*, 407 U.S. at 516-19 (five-year delay); *Dickey*, 398 U.S. 30 (1970) (eight-year delay); *Hooey*, 393 U.S. 374 (1969) (seven-year delay). Also, the Sixth Amendment takes substantial account of the reasons for the delay, *i.e.*, "whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett*, 112 S. Ct. at 2690. Thus, any Sixth Amendment claim by a defendant that rests on nothing more than an alleged violation of the 120-day rule would properly be dismissed as a matter of law without hesitation.

Thus, precluding collateral review of IAD claims would result in real savings of federal court resources. At the same

time, collateral review of IAD claims would at best only marginally advance what *petitioner* alleges to be the purpose of the 120-day rule — the protection of Sixth Amendment rights — and would not advance the most likely purpose of the provision at all. Virtually no IAD violations would rise to the level of a Sixth Amendment violation; and for those that do, the defendant need not rely on the IAD to seek *habeas* relief. Limiting review of IAD claims would thus not "seriously interfere with an accused's" Sixth Amendment rights. *Kimmelman*, 477 U.S. at 378. And collateral review would never be the only means through which a prisoner could raise a claim under the IAD. *Cf. Kimmelman*, 477 U.S. at 378. Prisoners can and do raise IAD claims on direct review with regularity, as petitioner did here, and State courts have not been shy about granting relief. *See* Annot. 98 A.L.R.3d 160 (1980).

The costs of *habeas* relief for IAD violations are particularly grave for another reason as well. *Habeas* relief would not result in the mere exclusion of evidence, as in *Stone*. Prisoners who were found guilty of crimes would be permanently set at liberty. This result is particularly troubling since, by definition, the IAD applies predominantly to *repeat offenders* — the class of prisoners who are uniformly understood to be the most menacing to society.

Nor is federal *habeas* review of IAD claims needed out of a concern that States either will not or cannot vigorously enforce the IAD. *Cf. Rose*, 443 U.S. at 561; *Kimmelman*, 477 U.S. at 378. Any State where a claim could arise would have enacted the IAD as its own state law, and would thus have no hostility toward its enforcement. The court of appeals observed that such voluntarily adopted laws are less likely to be objects of state court hostility than some constitutional rules. J.A. 204-05. This point seems especially applicable to the IAD because, given that other States' cooperation hinges on enforcement of the IAD, there are

additional incentives for state courts to comply, further reducing any need for collateral review.

Finally, awarding *habeas* relief for violations of the IAD produces a cost that is perhaps unique to interstate agreements. The more that traditional policies of finality and federalism are impinged upon by collateral relief for IAD violations and state resources are consumed by the burdens of litigating such collateral claims, the greater the incentive for States to opt out of participation in the IAD or to adopt modifications. *Habeas* relief for IAD claims thus could produce the perverse result of undermining the very policies served by the IAD.

All of this supports the conclusion that the proper standard for reviewing IAD claims is the *Stone* rule, rather than the standard used for non constitutional claims based on federal statutes. The Court recognized in *Stone* that non-constitutional claims are categorically different from constitutional claims, providing a proper basis for federal *habeas* relief only when the "alleged error constituted a fundamental defect which inherently results in a complete miscarriage of justice." 428 U.S. at 477 n.10. But a mere violation of the 120-day rule of the IAD's Article 4(c) could never, by itself, *inherently* result in a miscarriage of justice. A trial that commences 121 days (or 221 days) after transfer from custody could not be unjust simply because of the delay beyond 120 days. If some intervening circumstance caused a fundamental defect (if, *e.g.*, exculpatory evidence was lost on the 121st day) it would invariably be the intervening circumstance, rather than the IAD violation, that works the miscarriage. This particular nonconstitutional claim cannot "inherently" work a miscarriage. In any event, as shown in part III, *infra*, even if an IAD violation could *sometimes* result in a miscarriage of justice, at a minimum, case-specific prejudice is required to warrant *habeas* relief.

In sum, when the account is made up, the costs of federal collateral review of IAD violations far outweigh any possible marginal benefits. Accordingly, this Court should exercise its discretion under *Stone* to preclude such review.

III. FEDERAL *HABEAS CORPUS* RELIEF IS UNAVAILABLE BECAUSE PETITIONER CANNOT ESTABLISH A "FUNDAMENTAL DEFECT" RESULTING IN A "COMPLETE MISCARRIAGE OF JUSTICE."

Even if the IAD could properly support federal *habeas corpus* jurisdiction and was not subject to the rule of *Stone v. Powell*, petitioner still could not prevail under the normal standard of review for nonconstitutional claims under 28 U.S.C. § 2254. That standard requires that a petitioner show a "fundamental defect" in the trial which inherently resulted in a "complete miscarriage of justice." In order to satisfy that standard, a petitioner must, at a minimum, show actual prejudice to his right to a fair trial, something Reed has not even alleged.

As this Court held in *Hill v. United States*, 368 U.S. 424 (1962), an error "which is neither jurisdictional nor constitutional" cannot form the predicate for *habeas corpus* relief unless it is "a fundamental defect which inherently results in a complete miscarriage of justice." 368 U.S. at 428. Similarly, the Court in *Davis v. United States*, 417 U.S. 333 (1974), while granting relief, reaffirmed *Hill*'s fundamental defect standard, finding that a conviction for an act that the law does not make criminal "inherently results in a complete miscarriage of justice" under *Hill*. 417 U.S. at 346-47. The Court was careful to point out that collateral review does not reach "every asserted error of law." *Id.* at 346. The Court has reiterated this standard time and again. *E.g., United States v. Addonizio*, 442 U.S. 178, 185 (1979); *United States v. Timmreck*, 441 U.S. 780, 783 (1979); *Stone*, 428 U.S. at 478 n.10. Notably, *Davis* is apparently the only decision of

this Court to authorize *habeas* relief based upon a nonconstitutional claim, and even there, the circumstances were truly extraordinary, as the petitioner was imprisoned for conduct that the court of appeals later determined was not even a crime.

Petitioner's claim that § 2254 claims should be reviewed more stringently than § 2255 claims is meritless.[14] The same standard applies to nonconstitutional claims under both 28 U.S.C. § 2254 and § 2255. This Court specifically stated as much in *Stone*, 428 U.S. at 447 n.10, and when this Court formulated the fundamental defect standard in *Hill*, it relied on pre-§ 2255 *habeas corpus* cases for authority. 368 U.S. at 428 (citing *Bowen v. Johnston*, 306 U.S. 19, 27 (1939); *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Walker v. Johnston*, 312 U.S. 275 (1941); and *Waley v. Johnston*, 316 U.S. 101 (1942)). When the Court later applied the same standard in *Timmreck* and *Addonizio* (both § 2255 cases), it expressly relied on § 2254 cases. *Addonizio*, 442 U.S. at 184 n.11; *Timmreck*, 441 U.S. at 784 n.4 (both citing *Stone v. Powell* and *Henderson v. Kibbe*, 431 U.S. 145 (1977)); *accord Rose v. Lundy*, 455 U.S. 509, 548 n.18 (1982) (Stevens, J., dissenting).

As this Court has repeatedly held, § 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by *habeas corpus*." *Hill*, 368 U.S. at 427; *see also Davis*, 417 U.S. at 344 ("there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by

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[14] In the court of appeals, petitioner repeatedly argued that the grounds for relief under §§ 2254 and 2255 were equivalent, Brief of Appellant in Cause No. 90-3264 (7th Cir.) at 28 n.10, Reply Brief of Appellant at 8 n.2, and indeed appeared to concede the applicability of the "fundamental defect-complete miscarriage of justice" standard to nonconstitutional claims brought under § 2254. Brief of Appellant at 26; Reply Brief at 7.

§ 2254, the general federal habeas corpus statute"). Such a conclusion should hardly be controversial, since both statutes were passed in 1948 as part of the revision of the Judicial Code and Section 2254 was expressly intended to be "declaratory of existing law as affirmed by the Supreme Court." H.R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947). There is no sound basis for repudiating those repeated acknowledgments of the equivalence of § 2254 and § 2255 in this regard.[15]

If anything, as suggested by the First Circuit, concerns of federalism and comity not present when reviewing federal judgments may make § 2254 "more, rather than less, restrictive than § 2255." *Fasano v. Hall*, 615 F.2d 555, 557 (1st Cir.), *cert. denied*, 449 U.S. 867 (1980). In addition, § 2254 review is more attenuated from the judgment of conviction than § 2255 review in most cases. Because most States make available some form of collateral review following the direct appeal, § 2254 actually provides a third layer of review as opposed to the second layer provided to

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[15]Petitioner's only real argument seems to be that there is some sort of need to have the lower federal courts sit as courts of appeal over the state courts. Pet. Br. at 32 ("federal prisoners already have had federal review of their federal law and constitutional claims; the state prisoners have not."). The notion that *habeas corpus* should serve as some sort of proxy for a federal appeal is anaethema to this Court's jurisprudence. Indeed, as the very cases petitioner quotes hold, "the writ of *habeas corpus* will not be allowed to do service for an appeal." *E.g.*, *Sunal v. Large*, 332 U.S. 174, 178 (1947); *see* Pet. Br. at 33. Nor is it as crucial as petitioner seems to believe to have all issues of federal law reviewed by the federal district courts and courts of appeals. *Cf. Swain v. Pressley*, 430 U.S. 372, 382-83 & n.16 (1977) (noting adequacy of decision-making process that restricted both direct and collateral review of criminal convictions to the District of Columbia Court of Appeals, with review in this Court from those decisions). As noted *supra* at 21, the supposed "uniformity" concerns raised by petitioner, Pet. Br. at 28-31, would not necessarily be served by the rule he proposes, and might even be *disserved*.

federal prisoners by § 2255. In any event, as to nonconstitutional claims, at least, there is no reason for *more* stringent review.

As this Court's cases make plain, the "fundamental defect" standard applies to *any* claim that is "neither constitutional nor jurisdictional." *Timmreck*, 441 U.S. at 783-84; *Hill*, 368 U.S. at 428; *Stone*, 428 U.S. at 478 n.10. Petitioner's proposed distinction between laws that "protect" constitutional rights and those that do not is specious, for almost any law relating to criminal procedure can be characterized as "protecting" a constitutional right. For example, this Court has itself recognized that Fed. R. Crim. P. 11, the rule at issue in *Timmreck*, "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). Similarly, the right to allocution at sentencing, at issue in *Hill*, has been described as "constitutionally based." *United States v. Jackson*, 923 F.2d 1494, 1496 (11th Cir. 1991), and some courts have held that denial of a defendant's request to speak violates due process. *Boardman v. Estelle*, 957 F.2d 1523, 1528-30 (9th Cir.), *cert. denied*, 113 S. Ct. 297 (1992); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979).[16]

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[16]*Withrow*'s discussion of the "safeguard" function of the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), is inapposite. The purpose of that discussion was to analyze the applicability of *Stone*; the Court did not discuss the possibility that a *Miranda* violation is not a fundamental defect. Such a discussion would be largely academic, in any event, because the Court announced the same day as *Withrow* that a *Miranda* violation cannot be the basis for *habeas* relief unless it resulted in "actual prejudice" to the verdict — the functional equivalent of a fundamental defect. *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). *Withrow* thus cannot be relied on for the proposition that the violation of any law which safeguards a constitutional right is a fundamental defect giving rise to collateral relief.

Although the Court has left open whether a showing of prejudice will be *sufficient* to satisfy the *Hill* "fundamental defect" standard, *Hill*, 368 U.S. at 428; *Timmreck*, 441 U.S. at 784-85, it has left no doubt that such a showing is *necessary*. *See Hill*, 368 U.S at 429 (rejecting claim where "all that is shown" is violation of rule); *Timmreck*, 441 U.S. at 783 (noting absence of "any showing of prejudice"). Indeed, the "complete miscarriage of justice" component of the standard suggests by its very language that a particularly high standard of prejudice is required, for the Court has reserved the phrase "miscarriage of justice" to describe *habeas* cases in which the petitioner can make a showing of "factual innocence," *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518-19 (1992), or at least an effect upon the reliability of the guilt determination, *McCleskey v. Zant*, 499 U.S. 467, 502 (1991).[17]

Once the fundamental defect standard has been properly defined, its application to this case is not hard. Reed has not argued that the trial date was a fundamental defect in the proceeding that resulted in any prejudice to him, much less a "complete miscarriage of justice." Indeed, he appears to concede that he cannot show actual prejudice, arguing instead that every violation of the IAD time limits is a *per se* miscarriage of justice. Pet. Br. 36-38. As demonstrated above, however, Reed must show more than a "failure to comply with the formal requirements" of the IAD to obtain the extraordinary relief afforded by the writ of *habeas corpus*. *Hill*, 368 U.S. at 429.

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[17]The requirement of actual prejudice arises from the fundamental defect standard, not the IAD. Thus it is irrelevant that the IAD does not expressly condition dismissal on a finding of prejudice or that this Court ordered dismissal in a direct appeal case, *United States v. Mauro*, 436 U.S. 340 (1978). *See* Pet. Br. 37 n.20.

Nothing in this record suggests the sort of specific prejudice that is the "more serious" harm prevented by a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

> If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Id. Excessive delay may "presumptively compromise[] the reliability of a trial" in ways that cannot be proven or identified, *Doggett v. United States*, 112 S.Ct. 2686, 2693 (1992), but the nine-month delay between accusation and the first trial date in this case would not be enough to even trigger the four-factor *Barker* analysis. *See* authorities collected *supra* at 31.

Reed has never claimed that evidence or witnesses were lost as a result of the delay in this case. Neither has he alleged that the prosecution gained any advantage from the delay. This was noted by the court of appeals. 984 F.2d at 212 (J.A. 207-08). If anything, the delay worked to Reed's advantage. His federal custody ended on August 29, 1983 (J.A. 99), and he posted bond and was released from the Fulton County Jail on September 28, 1983 (J.A. 148). As he endlessly reminded the trial court, his ability to represent himself was hampered by his incarceration. For this reason he moved to continue the trial from September 19, 1983 (J.A. 128-30), and asked the court to delay the trial as long as possible when pretrial publicity required discharge of the jury venire (J.A. 141-42). Thus, Reed had been out of jail for three weeks when the trial began on October 18, 1983.

Because Reed has not even attempted to show that he was prejudiced by the delay in his trial from August 25 to September 19, 1983, he cannot as a matter of law receive

habeas corpus relief under the "fundamental defect" standard.[18]

IV. THIS COURT SHOULD NOT DECIDE THE MERITS OF PETITIONER'S IAD CLAIMS BECAUSE THE COURT OF APPEALS DID NOT PASS ON THOSE ISSUES AND THEY WERE NOT FAIRLY PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI.

Even if this Court concludes that alleged violations of the IAD fall within the jurisdictional grant of the *habeas* statutes and that collateral review is appropriate notwithstanding the rule of *Stone v. Powell* and the fundamental defect-complete miscarriage of justice standard, this Court should decline petitioner's invitation to decide the merits of his IAD claim for at least two reasons: (1) such consideration would violate this Court's well-established practice of refusing to pass upon issues not decided by the court below, and (2) the question was not fairly presented in the Petition for Writ of Certiorari.

Because of its view that violations of the IAD could not be reviewed on federal *habeas corpus* where the petitioner had a full and fair opportunity to litigate those claims in the state courts, the Seventh Circuit did not determine whether petitioner's rights under the IAD had in fact been violated. Nonetheless, the petitioner asks this Court not only to hold

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[18]Reed has not argued in his brief, as he did below and in his Reply Brief in Support of Petition for Certiorari (at 5-6), that he was prejudiced because the detainer prevented his participation in a halfway house program while awaiting trial. In any event, while the effect on the availability of rehabilitative programs was a motivating factor for the IAD itself, *see* Article 1, such considerations are not relevant to a determination of whether the trial was unfair or unreliable. Nothing in this Court's precedents suggests that the scope of *habeas corpus* relief includes compensation for the inability to participate in rehabilitative programs.

that the Court of Appeals erred in refusing to consider the merits of his IAD claim, but further asks this Court to proceed to adjudication of that claim in the first instance and "enter a judgment granting him a writ of *habeas corpus*." Pet. Br. at 42.

However, this Court ordinarily will not consider questions that were not passed on by the court below. *E.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984). While this rule "is not inflexible," petitioner has provided no reason whatever for this Court to disregard its long-standing practice, and there are particularly strong reasons not to do so in this case.

None of the three courts that have considered the issue (the trial court, the Indiana Supreme Court on direct review, and the district court on *habeas*) have found that petitioner had a valid IAD claim. The district court held, for example, that when the time under the IAD was properly calculated by excluding delay attributable to defense motions, the petitioner was brought to trial well within the IAD's time limits. J.A. 196.[19] Despite petitioner's attempt to portray that conclusion as groundless, with only a single exception the courts of appeal have uniformly applied such an analysis. *See United States v. Cephas*, 937 F.2d 816, 819, 821 (2d Cir. 1991); *United States v. Walker*, 924 F.2d 1, 5 (1st Cir. 1991); *United States v. Dawn*, 900 F.2d 1132, 1136-37 (7th Cir. 1990); *United States v. Taylor*, 861 F.2d 316, 321-22 (1st Cir. 1988)[20]; *United States v. Nesbitt*, 852 F.2d 1502, 1515-

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[19]Respondent consistently argued this point in the lower courts. *See, e.g.*, Brief of Appellee at 13-15.

[20]Petitioner suggests that *Taylor* supports his position that such delay is not excludable. Pet. Br. at 41. This is simply inaccurate. Rather, the court in *Taylor* excluded time attributable to pretrial defense motions, leaving open the possibility that, under some circumstances, a motion properly invoking the IAD's time limits might require a different analysis. 861 F.2d at 322 & n.4; *accord Walker*, 924 F.2d at 5.

16 (7th Cir. 1988); *United States v. Roy*, 771 F.2d 54, 59 (2d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986); *United States v. Scheer*, 729 F.2d 164, 168-69 (2d Cir. 1984); *United States v. Hines*, 717 F.2d 1481, 1486-87 (4th Cir. 1983); *United States v. Black*, 609 F.2d 1330, 1334-35 (9th Cir. 1979); *see also Foran v. Metz*, 463 F. Supp. 1088, 1097-98 (S.D.N.Y.), *aff'd mem.* 603 F.2d 212 (2d Cir.), *cert. denied*, 440 U.S. 830 (1979); *accord State v. Masselli*, 43 N.J. 1, 202 A.2d 415, 421 (1964) (expressly "reserv[ing] the question whether the pendency of defendant's motion to dismiss, which in fact prevented putting him on trial" operated to toll IAD time limits); *State v. George*, 271 N.C. 438, 156 S.E.2d 845, 848 (1979) ("the defendant cannot complain of delay in his trial when caused by his own motion."); *State v. Lippolis*, 107 N.J. Super. 137, 257 A.2d 705, 707 (App. Div. 1969) (defendant was "unable to stand trial" within the meaning of the IAD when in attendance at a hearing in another jurisdiction); *contra Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993) (not citing any of the foregoing authorities). As two courts of appeal have noted, this approach has the added benefit of simplifying the courts' application of that statute in conjunction with other federal speedy trial provisions. *Cephas*, 937 F.2d at 819; *United States v. Odom*, 674 F.2d 228, 231 (4th Cir. 1982).

The trial court and the Indiana Supreme Court concluded that petitioner had waived the IAD time limits by failing to object when a trial date was set and by filing motions after that time indicating an apparent intent to proceed to trial. J.A. 113-14; 156-57. These rulings, too, are at least arguably in line with existing caselaw under the IAD. *E.g.*, *People v. White*, 33 App. Div. 2d 217, 305 N.Y.S.2d 875, 878 (1969) (motion to suppress filed after expiration of IAD time limits amounted to a waiver).

In sum, petitioner's IAD claim is not nearly so straightforward as his brief attempts to portray it. Even if the

claim is cognizable on *habeas*, the court of appeals should be given the opportunity to address the claim in the first instance.

Perhaps more importantly, this Court did not grant certiorari to consider the merits of petitioner's IAD claims. The petition for certiorari presented a single question:

> Did the court of appeals err by extending the reasoning of *Stone v. Powell* to bar federal *habeas* review of a state prisoner's claim that he was being held in custody in violation of the IAD. . . .

Petition for Writ of Certiorari at i.[21] Nowhere in the question presented, or in the entire petition, for that matter, does petitioner suggest that this Court should review the merits of the IAD issue. Indeed, even the question presented in petitioner's *brief* does not suggest such a thing. *See* Pet. Br. at i (stating the question presented as whether the court of appeals erred by applying *Stone v. Powell* and "by refusing to provide this claim with collateral review based upon the same standards that it would use in collateral review of a constitutional claim.").[22]

Just as this Court ordinarily will ordinarily decline to pass upon an issue not decided by the court of appeals, it similarly will normally decline to decide questions not presented in the petition. *See* Sup. Ct. R. 14.1(a); *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion).

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[21]The remainder of the question presented consisted of a gratuitous characterization of the IAD as "a 'law[] . . . of the United States,'" and an argumentative recitation of circumstances that supposedly made it "particularly" appropriate for this Court to review the question quoted in the text, but did not suggest the other issues petitioner now raises.

[22]Respondents do not dispute that, should the Court find *habeas* jurisdiction and reject application of *Stone*, a determination of the correct standard of review *is* fairly included.

Again, petitioner provides no reason this Court should disregard that rule, and the reasons set forth above counsel against the Court's doing so in this case.

CONCLUSION

The Great Writ of *habeas corpus* is not a remedy for breach of contract, even where the contract is an agreement among the States. Rather, the writ lies to assure that the fundamental federal constitutional rights of criminal defendants are observed. Because granting the writ would not serve that purpose here, the judgment of the court of appeals affirming the denial of the writ of *habeas corpus* should be affirmed.

Respectfully submitted,

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Appendix A

Ind. Code § 35-33-10-4. Agreement on detainers; defendants confined in other jurisdiction of United States

Sec. 4. Securing attendance of defendants confined as prisoners in institutions of other jurisdictions of the United States — Agreement on detainers.

Text of the Agreement of Detainers

The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article 2

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time he initiates a request for final disposition pursuant to Article 3 of this section or at the time that a request for custody or availability is initiated pursuant to Article 4 hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article 3 or Article 4 hereof.

Article 3

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction or other official having custody of him, who shall promptly

forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of correction or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, information or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition specifically directed. The warden, commissioner of correction or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge of proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon

him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article 4

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article 5(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody of availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time

remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided by paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article 5 (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article 5

(a) In response to a request made under Article 3 or Article 4 hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice

provided for in Article 3 of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment,information of complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article 3 or Article 4 hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations [or] complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which is presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivision, as to the payment of costs, or responsibilities therefor.

Article 6

(a) In determining the duration and expiration dates of the time periods provided in Articles 3 and 4 of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article 7

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article 8

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article 9

1. This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is

held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

2. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean any court with criminal jurisdiction.

3. All courts, department, agencies, officers and employees of this state and its political subdivision are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

4. Escape from custody while in another state pursuant to the agreement on detainers shall constitute an offense against the laws of this state to the same extent and degree as an escape from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provisions of the agreement on detainers and shall be punishable in the same manner as an escape from said institution.

5. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate hereof whenever so required by the operation of the agreement on detainers.

6. The governor is hereby authorized and empowered to designate an administrator who shall perform the duties and functions and exercise the powers conferred upon such person by Article 7 of the agreement on detainers.

7. In order to implement Article 4(a) of the agreement on detainers, and in furtherance of its purposes, the

appropriate authorities having custody of the prisoner shall, promptly upon receipt of the officer's written request notify the prisoner and the governor in writing that a request for temporary custody has been made and such notification shall describe the source and contents of said request. The authorities having custody of the prisoner shall also advise him in writing of his rights to counsel, to make representations to the governor within thirty (30) days, and to contest the legality of his delivery.

APPENDIX B: TABLE OF STATES ADOPTING THE IAD BY YEAR OF ADOPTION

Year	State	Statutory Citation
1957	Connecticut	(C.G.S.A. §§ 54-186 to 54-192)
1958	New Jersey	(N.J.S.A. 2A:159A-1 to 2A:159A-15)
1959	New Hampshire	(R.S.A. 606-A:1 to 606-A:6)
	Pennsylvania	(42 Pa.C.S.A. §S 9101 to 9108)
1961	Michigan	(M.C.L.A. §§ 780.601 to 780.608)
1963	Montana	(M.C.A. 46-31-101 to 46-31-204)
	California	(West's Ann. Cal. Penal Code §S 1389 to 1389.8)
	Nebraska	(R.R.S. 1943, §§ 29-759 to 29-765)
1965	North Carolina	(G.S. §§ 15A-761 to 15A-767)
	Iowa	I.C.A. §§ 821.1 to 821.8)
	South Carolina	(Code 1976, §§ 17-11-10 to 17-11-80)

1965 (Cont'd)

	Maryland	(Code 1957, art. 27, §§ 616A to 6168)
	Hawaii	(HRS §§ 834-1 to 835-6)
1966	Massachusetts	M.G.L.A. c. 276 App. §§ 1-1 to 1-8)
1967	Washington	(West's RCWA 9.100.010 to 9.100.080)
	Vermont	(28 V.S.A. §§ 1501 to 1509, 1531 to 1537)
	Minnesota	(M.S.A. § 629.294)
1969	Oregon	(ORS 135.775 to 135.793)
	Ohio	(R.C. §§ 2963.30 to 2963.35)
	Delaware	(11 Del.C. §§ 2540 to 2550)
	Colorado	(C.R.S. 24-60-501 to 24-60-507)
1970	Arizona	(A.R.S. §§ 31-481, 31-482)
	District of Columbia	(D.C.Code 1981, §§ 224-701 to 24-705)
	Kansas	(K.S.A. 22-4401 to 22-4408)
	Tennessee	(T.C.A. §§ 40-31-101 to 40-31-108)
	Virginia	(Code 1950, §§ 53.1-210 to 53.1-215)
	Wisconsin	(W.S.A. 976.05, 976.06)

1970 (Cont'd)

	United States	(18 U.S.C. app.)
	New York	(McKinney's CPL § 580.20)
1971	Wyoming	(W.S.1977, §§ 7-15-101 to 7-15-107)
	West Virginia	(W. Va. Code 62-14-1 to 62-14-7)
	Arkansas	(A.C.A. §§ 16-95-101 to 16-95-107)
	Idaho	(I.C. §§ 19-5001 to 19-5008)
	Maine	(34-A M.R.S.A. §§ 9601 to 9609)
	Missouri	(V.A.M.S. §§ 217.490 to 217.520)
	Nevada	(N.R.S 178.620 to 178.640)
	New Mexico	(NMSA 1978, § 31-5-12)
	North Dakota	(NDCC 29-34-01 to 29-34-08)
1972	Georgia	(O.C.G.A §§ 42-6-20 to 42-6-25)
1973	Florida	(West's F.S.A. §§ 941.45 to 941.50)
	Illinois	(S.H.A. ch. 38 1003-8-9)
	Indiana	(Ind. Code 35-33-10-4)

1974	Rhode Island	(Gen.Laws 1956, §§ 13-13-1 13-13-8)
	Kentucky	(K.R.S. 440.450 to 440.510)
1975	Texas	(Vernon's Ann.Texas Code Cr. Pr. Art. 51.14)
	Utah	(U.C.A.1953, 77-29-5 to 77-29-11)
1977	Oklahoma	(22 Okl.St.Ann §§ 1345 to 1349)
1978	Alabama	(Code 1975, § 15-9-81)
1981	Alaska	(AS 33.35.010 to 33.35.040)